

2010 WL 5594466 (Minn.App.) (Appellate Brief)
Court of Appeals of Minnesota.

Peggy GREER, Appellant,

v.

PROFESSIONAL FIDUCIARY, INC.; Wells Fargo Bank, N.A.; Wells Fargo Investments,
L.L.C. d/b/a Wells Fargo Private Bank **Elder** Services; and Ruth Ostrom, Respondents.

No. A10-716.

June 14, 2010.

Appellant's Opening Brief and Appendix

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*5 LEGAL ISSUES

- I. Did the District Court err in dismissing Ms. Greer's claims against PFI and the Wells Fargo Respondents on the basis of *res judicata*?
- II. Did the District Court err in dismissing Ms. Greer's claims against PFI's agent, Ms. Ostrom, while at the same time allowing Ms Greer's claims to proceed against PFI based on Ms. Ostrom's conduct?
- III. Did the District Court err in failing to take into account Paragraph 9 of Ms. Greer's Complaint with regard to Ms. Greer's allegations against Wells Fargo **Elder** Services?

STATEMENT OF FACTS

Appellant Peggy Greer is an 87-year-old woman, who was under a guardianship and conservatorship from March 2005 to July 2007. (App. 1-2.) Respondent Professional Fiduciary, Inc. ("PFI") was Ms. Greer's court-appointed guardian, and Respondent Ruth Ostrom represented PFI as its attorney as regards Ms. Greer's guardianship. (App. 2.) Respondent Wells Fargo Bank, N.A. ("Wells Fargo") was Ms. Greer's court-appointed conservator, and to the best of Ms. Greer's knowledge, Wells Fargo delegated that role to Wells Fargo Investments, L.L.C. d/b/a Wells Fargo Private Bank **Elder** Services ("Wells Fargo **Elder** Services") (collectively, Wells Fargo and Wells Fargo **Elder** Services shall be referred to as the "Wells Fargo Respondents"). (App. 2-3.)

On July 6, 2007, Ms. Greer's capacity was restored, and the guardianship and conservatorship were terminated. (App. 3.) During the two years of Ms. Greer's guardianship and conservatorship, the conservator and guardian expended \$640,127.77 of ***6** Ms. Greer's assets. (App. 3.) At the time her capacity was restored, she had no assets left; her home was encumbered by a reverse mortgage, and her other assets had been fully expended by the conservator and guardian. (App. 3-4.) She was left to live on her monthly Social Security payment of \$1,103.

On April 29, 2009, Ms. Greer commenced this action by serving the Respondents. Ms. Greer sought compensatory damages from PFI and the Wells Fargo Respondents for breach of fiduciary duties, negligence, and intentional and negligent infliction of

emotional distress for their conduct as Ms. Greer's guardian and conservator, respectively. (App. 3-15.) Ms. Greer also sought compensatory damages from Ms. Ostrom for breach of fiduciary duties in her capacity as PFI's attorney. (App. 12-15.)

In lieu of answering, PFI and the Wells Fargo Respondents separately filed motions to dismiss for failure to state a claim under Rule 12.02 of the Minnesota Rules of Civil Procedure. (App. 17-20.) Likewise, Ms. Ostrom filed a motion for judgment on the pleadings pursuant to Rule 12.03 of the Minnesota Rules of Civil Procedure. (App. 21-23.) Discovery was stayed pending resolution of these motions. These motions came for hearing before the Honorable Marilyn Kaman on August 5, 2009. (App. 24-27.)

On November 9, 2009, Judge Kaman issued the Order Granting Motions To Dismiss Claims Against Wells Fargo And Ostrom; Order Granting, In Part, Motion to Dismiss Claims Against PFI ("November 9 Order"), which dismissed with prejudice Ms. Greer's claims against Wells Fargo, Wells Fargo **Elder** Services, and Ms. Ostrom, and dismissed with prejudice Ms. Greer's claims against PFI as they relate to PFI's conduct during its time as Ms. Greer's guardian. (Add. 25.) The November 9 Order denied PFI's *7 motion to dismiss claims with regard to its conduct alleged after its discharge as Ms. Greer's guardian. (Add. 25.) Ms. Greer petitioned this Court for interlocutory review of the November 9 Order, which was denied by an order dated December 23, 2009. (App. 507-517, 538-539.)

On March 18, 2010, the Honorable Jay Quam, who replaced Judge Kaman as presiding judge in this matter, issued the Order Directing Entry Of Final Judgment As To Claims Dismissed With Prejudice And Dismissal Without Prejudice Of Remaining Claims ("March 18 Order"). (App. 540-541.) The March 18 Order, signed pursuant to a stipulation entered between Ms. Greer and PFI to dismiss without prejudice Ms. Greer's remaining claims, effectively disposed of all claims in the matter. (App. 540-541.)

Ms. Greer subsequently filed a Notice of Appeal on April 20, 2010, seeking review of the claims dismissed by Judge Kaman in the November 9 Order. (App. 542-544.) This appeal follows.

STANDARD OF REVIEW

In cases involving a dismissal for failure to state a claim upon which relief can be granted under Rule 12.02, "the question before the appellate court is whether the complaint sets forth a legally sufficient claim for relief." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2005). The standard of review, therefore, in the instant case is *de novo*, and further, "an appellate court need not give deference to a trial court's decision on a legal issue." *Frost-Benco Elec. Ass't v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984). See *Port Authority of City of St. Paul v. RLR, Inc.*, 758 N.W.2d 604, 606 (Minn.App. 2008). Rather, the appellate court must *8 "accept the factual allegations in the pleading under attack [...] as true and [...] liberally construe the complaint and draw all inferences and assumptions in favor of the nonmoving party." *Hoffman v. Northern States Power Co.*, 764 N.W.2d 34, 45 (Minn. 2009). See *Marquette Nat'l Bank v. Norris*, 270 N.W.2d 290, 292 (Minn. 1978); *Minnesota Ass'n of Professional Employees v. Anderson*, 736 N.W.2d 699, 701 (Minn.App. 2007) (appellate court must "accept as true the facts alleged in the complaint and construe all reasonable inferences in favor of the nonmoving party").

Additionally, "[a] motion for judgment on the pleadings is not a favored way of testing the sufficiency of a pleading, and will not be sustained if by a liberal construction the pleading can be held sufficient." *Ryan v. Lodemeier*, 387 N.W.2d 652, 653 (Minn.App. 1986). "[T]he pleadings must be construed favorably to the party against whom the judgment is asked," and "[o]nly if the pleading creates no fact issues should a motion for judgment on the pleadings be granted." *Id.* Thus, "[t]he only question on review of a judgment on the pleadings is whether the complaint sets forth a legally sufficient claim for relief." *Kellar v. VonHoltum*, 568 N.W.2d 186, 190 (Minn.App. 1997).

ARGUMENTS

I. THE DISTRICT COURT INCORRECTLY DISMISSED MS. GREER'S CLAIMS AGAINST PFI AND THE WELLS FARGO RESPONDENTS ON THE BASIS OF *RES JUDICATA*.

In the November 9 Order, the District Court incorrectly applied principles of *res judicata* in dismissing Ms. Greer's claims against the Wells Fargo Respondents and against PFI for claims that arose during its time as Ms. Greer's guardian. (Add. 12-17.)

*9 *Res judicata* precludes subsequent litigation of claims under certain circumstances. [Hauschildt v. Beckingham](#), 686 N.W.2d 829, 840 (Minn. 2004). It arises “when the parties [...] to two actions are the same, the second suit is for the same cause of action, and the original judgment was on the merits.” [Care Institute, Inc.-Roseville v. County of Ramsey](#), 612 N.W.2d 443, 447 (Minn. 2000). In applying *res judicata*, Minnesota courts look at whether “(1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involves the same parties or their privies; (3) there was a final judgment on the merits; [and] (4) the estopped party had a full and fair opportunity to litigate the matter.” [Hauschildt](#), 686 N.W.2d at 840. As to the first element, “the focus of *res judicata* is whether the second claim ‘arise[s] out of the same set of factual circumstances.’” *Id.*, quoting [Hauser v. Mealey](#), 263 N.W.2d 8093, 807 (Minn. 1978). Additionally, “if the right to assert the second claim did not arise at the same time as the right to assert the first claim, then the claims cannot be considered the same cause of action.” [Care Institute, Inc.](#), 612 N.W.2d at 447.

As will be set forth in more detail below, (A) the guardianship and conservatorship proceedings did not arise from or involve the same set of factual circumstances or any claim of breach of fiduciary duty; (B) none of the current defendants were parties to the guardianship proceedings; (C) the accountings in the guardianship and conservatorship proceedings do not constitute a final judgment on the merits of Ms. Greer's instant claims; and (D) Ms. Greer was statutorily incapable of bringing the instant claims in the guardianship proceedings, and she had no opportunity to litigate these claims in the guardianship and conservatorship proceedings. Thus, the district court erred in *10 dismissing Ms. Greer's claims, and that order should be reversed.

A. The Lawsuit Did Not Arise From The Same Facts As The Guardianship And Conservatorship Proceedings, Nor At The Same Time.

The District Court dismissed Ms. Greer's claims under the premise that, since her claims “are based on Wells Fargo's actions relative to her while Wells Fargo was her Conservator,” they do not represent causes of action distinct from the guardianship and conservatorship proceedings. (Add. 16.) This finding, however, is controverted by the fact that the present claims arose out of conduct that occurred after Ms. Greer's guardianship and conservatorship proceedings were initiated.

The sole question in a guardianship and conservatorship proceeding is whether the intended ward is in need of a guardian or conservator. See [Minn. Stat. §524.5-303 \(2009\)](#). Indeed, the district court may appoint a guardian “only if it finds by clear and convincing evidence that: (1) the respondent is an incapacitated person; and (2) the respondent's identified needs cannot be met by less restrictive means, including use of appropriate technological assistance.” [Minn. Stat. §524.5-310 \(a\) \(2009\)](#). And, the district court must also “grant to a guardian only those powers necessitated by the ward's limitations and demonstrated needs and, whenever feasible, make appointive and other orders that will encourage the development of the ward's maximum self-reliance and independence.” [Minn. Stat. §524.5-301 \(c\) \(2009\)](#).

The facts giving rise to this lawsuit arose well after the filing of the petition that initiated Ms. Greer's guardianship and conservatorship proceedings. Indeed, Ms. Greer's claims did not arise until the guardian and conservator breached their fiduciary duties to *11 her as her guardian and conservator. (App. 3-12.) The Supreme Court found in [Care Institute](#) that, if the right to assert the second claim did not arise at the same time as the right to assert the first, the two claims are not the same cause of action. [Care Institute, Inc.-Roseville](#), 612 N.W.2d at 447. Here, it is difficult to discern what the “first claim” was, as the only “claim” in the guardianship and conservatorship proceedings was whether or not Ms. Greer was incapacitated. But, even if that is determined to be a claim for the purposes of *res judicata*, it is clear that this “claim” is wholly distinct and separate from Ms. Greer's claims against the Wells Fargo Respondents and PFI for breaches of fiduciary duty, negligence, and intentional and negligent infliction of emotional distress.

For these reasons, this Court should reverse the District Court's findings with regard to *res judicata* and remand for further proceedings.

B. PFI And The Wells Fargo Respondents Were Not “Parties” To The Guardianship And Conservatorship Proceedings.

Guardianships and conservatorships are solely creatures of statute. See [Minn. Stat. §§ 524.5-101 to 524.5-502](#). As such, there are no plaintiffs or defendants in a guardianship and conservatorship proceeding. The only “party” to the guardianship and conservatorship proceedings is the “incapacitated person,” defined in [Minn. Stat. § 524.5-102](#) subd. 6 as:

an individual who, for reasons other than being a minor, is impaired to the extent of lacking sufficient understanding or capacity to make or communicate responsible personal decisions, and who has demonstrated deficits in behavior which evidence an inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety, even with appropriate technological assistance.

Under the statute, the guardian is to care for the incapacitated person. See [*12 Minn. Stat. § 524.5-313 \(2009\)](#). A conservator is to care for the **financial** affairs of the incapacitated person. See [Minn. Stat. § 524.5-417 \(2009\)](#). Thus, neither the guardian nor the conservator is a “party” to the guardianship proceeding. Nothing in the statute even remotely suggests that the guardian or conservator is a “party” in the action. Rather, the statutes define a guardian or conservator as an “interested person,” with rights to notice and to receive reports and other documentation from the proceedings. See [Minn. Stat. § 524.5-113 \(2009\)](#).

While the District Court did not even address this argument in the November 9 Order, the second requirement for applying the doctrine of *res judicata* is clearly absent here, and the District Court erred in barring Ms. Greer's claims for breach of fiduciary duty against the guardian and conservator. For this reason, this Court should reverse the District Court's dismissal of Ms. Greer's claims and remand for further proceedings.

C. The Orders And Accountings From Ms. Greer's Guardianship And Conservatorship Proceedings Do Not Constitute A Final Judgment On The Merits Of Her Instant Claims; Therefore, The District Court Incorrectly Dismissed Ms. Greer's Claims.

In applying the doctrine of *res judicata*, the District Court relied primarily on trust law in finding that “a court-approved accounting serves as a final judgment of all matters during that accounting.” (Add. 13). In trust law, a trustee or interested person may petition a court for an order that, *inter alia*, settles and allows an accounting of the trust. [Minn. Stat. § 501B.16 \(2009\)](#). Furthermore, a district court shall make an appropriate order upon hearing a petition filed under [§ 501B.16](#), and “[t]he order is final as to all matters determined by it and binding *in rem* upon the trust estate and upon the interests of [*13](#) all beneficiaries, vested or contingent, even though unascertained or not in being.” [Minn. Stat. § 501B.21 \(2009\)](#). This statutory regime establishes the finality of orders allowing an accounting in trust law. See [Matter of Trusts by Hormel](#), 543 N.W.2d 668, 671 (Minn.App. 1996) (petition alleging breach of trust filed by beneficiaries under [Minn. Stat. § 501B.16](#)). The foundation for the application of *res judicata* in trust cases is the *in rem* nature of a trust. The assets of a ward are not *in rem*. The cases involving trusts are not applicable to guardianship cases, and the District Court's reliance on them was misplaced.

Even if trust law somehow applied to this case, the District Court erred in applying it. An order allowing an accounting in trust law is only *res judicata* as to matters disclosed and determined by the order; such orders are not *res judicata* as to matters where material facts are not disclosed or determined by the order. [In re Enger's Will](#), 30 N.W.2d 694, 702 (Minn. 1948). Similarly, while orders allowing accountings were issued as part of Ms. Greer's guardianship and conservatorship proceedings, the facts supporting Ms. Greer's instant claims against PFI and the Wells Fargo Respondents were not subject to or disclosed in those orders. Thus, *res judicata* does not preclude her claims against the Wells Fargo Respondents and PFI.

Minnesota courts have held that “if a matter was determined by the order [allowing an accounting] the order is *res judicata*, and if the matter was not so determined the order is not *res judicata*,” *In re Enger's Will*, 30 N.W.2d at 702. Thus, where facts are not disclosed in an accounting, then an order allowing the accounting does not preclude a later claim on those facts on the basis of *res judicata*. *Id.* Further, *14 where facts showing the illegality of an investment listed in an accounting are not included in the accounting, “the order is not *res judicata* as to the question of the illegality of the investment, because the mere listing of it fails to apprise the beneficiaries of the fact of the illegality.” *Id.*

Minnesota law regarding guardianship and conservatorship proceedings provides for a report that “state[s] or contain[s] a listing of the assets of the estate under the conservator’s control and a listing of the receipts, disbursements, and distributions during the reporting period.” Minn. Stat. § 524.5-420 (b) (2009). As such, to the extent an accounting in a guardianship and conservatorship proceeding qualifies as a final judgment, it can only preclude claims on the basis of *res judicata* for those matters--receipts, disbursements, and distributions--actually disclosed or determined by the accounting.

By definition, orders and accountings from Ms. Greer’s guardianship and conservatorship proceedings could not and did not disclose facts relevant to Ms. Greer’s allegations against PFI and the Wells Fargo Respondents. (App. 4-12.) See Minn. Stat. § 524.5-420 (b) (2009). The court-approved accountings upon which the District Court relied in its dismissal of Ms. Greer’s claims against PFI and the Wells Fargo Respondents merely disclosed Ms. Greer’s assets, income and expenses during the time PFI and the Wells Fargo Respondents acted as Ms. Greer’s fiduciaries. (App. 3.) As such, the District Court incorrectly dismissed Ms. Greer’s instant claims against PFI and the Wells Fargo Respondents on the basis of *res judicata*, as the orders and accountings from Ms. Greer’s guardianship and conservatorship proceedings *did not* constitute a final judgment *15 on the merits of those claims since they were neither disclosed nor determined in those accountings.

The Court should thus reverse and remand the dismissal of Ms. Greer’s claims against PFI and the Wells Fargo Respondents for this reason.

D. Ms. Greer Had No Opportunity To Litigate These Claims In The Guardianship And Conservatorship Proceedings Because She Was Statutorily Prohibited From Doing So.

The application of *res judicata* requires that a party have the opportunity to fully and fairly litigate her claims. *Hauschildt*, 686 N.W.2d at 840. Although the District Court did not address this element of *res judicata* in its November 9 Order, Ms. Greer, a protected person under a guardianship and a conservatorship, did not have any opportunity to fully and fairly litigate the instant claims for breaches of fiduciary duties, negligence, and intentional and negligent infliction of emotional distress against PFI and the Wells Fargo Respondents because she did not have the power to institute suit on her own behalf. Rather, that duty fell to the conservator, the Wells Fargo Respondents.

While under a conservatorship, a protected person does not have the right to file suit on her own behalf. Rather, § 524.5-417(c) (3) of the Minnesota Uniform Probate Code states that “[t]he duties and powers of a conservator include [...] the duty to [...] institute suit on behalf of the protected person and represent the protected person in any court proceedings.” In order to regain the ability to institute suit on her own behalf, a protected person must regain capacity through the probate court, and the probate court must discharge the guardian and conservator. The fact that Ms. Greer had attorneys either chosen by her or appointed for her did not change the statute or give Ms. Greer the *16 right to institute this suit.

Wise for Kocemba v. Bix, a case¹ relied on by the District Court, supports this premise. No. C4-88-2366, 1989 WL 35605 (Minn.App. April 18, 1989). In that case, petitions were filed disputing a first annual accounting in March 1987, which included allegations of the unreasonableness of reported attorney and conservator fees, and hearings were held on those petitions. *Kocemba*, 1989 WL 35605, at *1. The ward’s successor conservator filed a complaint, which was dismissed, alleging breaches of fiduciary duties against the former conservator and his attorney for the payments of unnecessary fees. *Id.* On appeal, this Court found that “[b]ecause the reasonableness of the fees charged by the conservator and her attorney were litigated in the probate

court, the present claim is based on the same transactions which are subject to the probate court's order." *Id.* at *2 (emphasis added). Further, the probate court, in its order allowing the first annual accounting with reduced attorney and conservator fees, made specific findings with regard to the reasonableness of those fees. *Id.* Standing in stark contrast to this case, the ward in *Kocemba* had the opportunity to litigate those claims for breach of fiduciary duties, unlike Ms. Greer who has had no opportunity to litigate her instant claims against PFI and the Wells Fargo Respondents. The District Court's reliance on *Kocemba*, improper under the statute, was also improper because, contrary to the District Court's view, this case is clearly distinguishable from the case at bar.

*17 For these reasons, this Court should reverse the District Court's dismissal for Ms. Greer's claims and remand for further proceedings.

II. THE DISTRICT COURT ERRED IN DISMISSING MS. GREER'S CLAIMS AGAINST PFI'S AGENT, MS. OSTROM, WHILE AT THE SAME TIME ALLOWING MS GREER'S CLAIMS TO PROCEED AGAINST PFI BASED ON MS. OSTROM'S CONDUCT.

In her Complaint, Ms. Greer alleged breaches of fiduciary duties against Ms. Ostrom arising out of Ms. Ostrom's actions as PFI's attorney and agent. (App. 12-14.) In her Complaint, Ms. Greer also made identical claims against PFI based solely on its status as the principal for whom Ms. Ostrom acted. The District Court erroneously relied on professional negligence law to dismiss Ms. Greer's claims against Ms. Ostrom, holding that Ms. Ostrom was not liable to Ms. Greer because Ms. Greer was not Ms. Ostrom's client. (Add. 22-25.) In the same breath, however, the District Court allowed the same allegations to stand against PFI. (Add. 17-21.)

If Ms. Greer states a claim against PFI for Ms. Ostrom's tortious conduct, then Ms. Greer also states a claim against Ms. Ostrom for the very same tortious conduct. Under Minnesota law, an agent acting within the scope of her agency can be held personally liable for the torts she commits. *Graff v. Robert M. Swendra Agency, Inc.*, 776 N.W.2d 744, 749 (Minn.App. 2009). See *Restatement (Third) of Agency § 7.01* (2006) ("An agent is subject to liability to a third party harmed by the agent's tortious conduct. [...] [A]n actor remains subject to liability although the actor acts as an agent [...] with actual or apparent authority[.]") Further, "an agent's liability is unaffected by the possible liability of the principal." *Id.* In Minnesota, courts have also "long relied on the *18 well-recognized rule that all who actively participate in the commission of a tort, or who procure, command, direct, advise, encourage, aid, or abet its commission, or who ratify it after it is done are jointly and severally liable for the resulting injury." *Witzman v. Lehrman, Lehrman & Flom, et al.*, 601 N.W.2d 179, 185-86 (Minn. 1999). Therefore, Minnesota law establishes that an agent may be held personally liable for the torts she commits both within and outside the scope of her agency. *Graff*, 776 N.W.2d at 749.

In her allegations against PFI, Ms. Greer pled that PFI was liable, as a principal, for its agent's (Ms. Ostrom's) tort. (App. 6-10.) The District Court found these allegations sufficient to withstand PFI's Rule 12 motion to dismiss Ms. Greer's claims for breach of fiduciary duties, negligence, and intentional and negligent infliction of emotional distress. (Add. 17-21.) Thus, the District Court held, Ms. Greer stated claims that PFI, through its agent Ms. Ostrom, committed torts causing injury to Ms. Greer. Therefore, Ms. Ostrom may be held similarly liable for the same torts, as PFI's agent.

As a result, this Court should reverse the District Court's dismissal of Ms. Greer's claims against Ms. Ostrom and remand for further proceedings.

III. THE DISTRICT COURT ERRED IN FAILING TO TAKE INTO ACCOUNT PARAGRAPH 9 OF MS. GREER'S COMPLAINT WITH REGARD TO MS. GREER'S ALLEGATIONS AGAINST WELLS FARGO ELDER SERVICES.

The District Court found that Ms. Greer did not respond to arguments put forward by the Wells Fargo Respondents that she failed to allege facts that would give rise to liability on the part of Wells Fargo **Elder** Services, and thus that Ms. Greer conceded those arguments. (Add. 12.) To the contrary, Ms. Greer did allege facts that give rise to *19 a cause of action against Wells Fargo **Elder** Services, and did not concede those arguments to the Wells Fargo Respondents. (App. 3-6.) Furthermore, the District Court, in its Rule 12 analysis, did not give Ms. Greer the benefit of all inferences, as required by law, but rather improperly gave deference to the Wells Fargo Respondents and assertions in their motion to dismiss Ms. Greer's claims. (Add. 12.)

In assessing a Rule 12 motion, courts must view all facts in a light most favorable to the nonmoving party and accept all allegations as true. *Northern States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963) (“a pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded”). See *Hoffman*, 764 N.W.2d at 45 (all inferences must be drawn in favor of the nonmoving party). The District Court in this case did just the opposite. Here, in paragraph 9 of her Complaint, Ms. Greer alleged that Wells Fargo “charged Wells Fargo **Elder** Services with administering its duties as Ms. Greer's conservator.” (App. 3.) This established that Wells Fargo **Elder** Services owed the same duties to Ms. Greer as Wells Fargo owed to Ms. Greer. (App. 3-6.) Further, the duties Ms. Greer alleged were owed her by Wells Fargo **Elder** Services were the same duties Ms. Greer alleged were breached by Wells Fargo. (App. 3-6.) In the context of paragraph 9 and the claims alleged in Ms. Greer's Complaint, and drawing all inferences in favor of Ms. Greer, Ms. Greer sufficiently pled allegations that give rise to a cause of action against Wells Fargo **Elder** Services.

Additionally, Ms. Greer did not “concede” the arguments put forward by the Wells Fargo Respondents that Ms. Greer failed to allege facts giving rise to Wells Fargo **Elder** *20 Services' liability for its breaches of fiduciary duties, negligence, and intentional and negligent infliction of emotion distress. (Add. 12.) Rather, in her briefing in response to the Wells Fargo Respondents' Rule 12 motion to dismiss, Ms. Greer consistently referred to Wells Fargo and Wells Fargo **Elder** Services, collectively, as the Wells Fargo Defendants, and argued consistently that the Wells Fargo Defendants were Ms. Greer's conservator. (App. 398-405.) Thus, for example, Section I of Ms. Greer's Response To Motions To Dismiss By Defendant Wells Fargo Bank N.A. And Defendant Wells Fargo Investments, L.L.C. is titled: “Ms. Greer States Claims Upon Which Relief Can Be Granted Against *The Wells Fargo Defendants*.” (App. 398.) (emphasis added) Nowhere in her briefings on the Rule 12 motion does Ms. Greer refer to Wells Fargo as having separate liability from Wells Fargo **Elder** Services. (App. 398-405.) Instead, they are only referred to as one and the same in their actions as Ms. Greer's conservator. (App. 398-405.) Moreover, if there was any confusion, the District Court could have provided Ms. Greer leave to amend her Complaint to perfect her allegations against Wells Fargo **Elder** Services.

Thus, because the District Court did not give Ms. Greer the benefit of all inferences owed her in its dismissal of her claims against Wells Fargo **Elder** Services, this Court should reverse and remand for further proceedings. To the extent Ms. Greer's Complaint is unclear in its allegations against Wells Fargo **Elder** Services, Ms. Greer requests this Court remand to the District Court with instructions to provide Ms. Greer leave to amend her Complaint accordingly.

*21 CONCLUSION

For all the foregoing reasons, Ms. Greer respectfully asks this Court to reverse the District Court's dismissal of her claims against Wells Fargo, Wells Fargo **Elder** Services, PFI, and Ms. Ostrom, and remand for further proceedings.

Appendix not available.

Footnotes

- 1 Appellant is mindful of *Minn. Stat. § 480A.08* (2009), which provides that unpublished opinions of the Minnesota Court of Appeals are not precedential. This case is discussed only because the District Court improperly relied upon it in granting Respondents' Rule 12 motions.

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